VIRGINIA LAW REVIEW

Published Monthly, During the Academic Year, by University of Virginia Law Students

Subscription Price, $2.50 per Annum - - 35c per Number

MEASURE OF DAMAGES IN ACTION AGAINST CARRIER FOR RATE DISCRIMINATION.—The common carrier's peculiar relation to the public has long been recognized, and his business in some way regulated, on the very obvious ground of its being affected with a public interest. Some doubt formerly existed, however, and to a certain extent still exists, as to just what burdens the law has imposed upon the common carrier. In England at a very early date the common law required that he serve all who applied to him, upon the payment of a reasonable compensation. If one who held himself out as a common carrier refused to accept goods from any shipper at a reasonable rate, such refusal gave the shipper a right of action for damages,[1] and if the carrier demanded an unreasonably high rate and a shipper paid it under protest he was allowed to recover the surplus over a reasonable rate.[2]

But a question which has caused differently is whether, in addition to this requirement of reasonableness, the common law also prohibited discrimination. It seems well settled that in England there was no such rule.[3] The emphasis was certainly always on the reasonableness, and it seems that so long as the rate charged one shipper was reasonable, he could not complain merely on the ground

[1] Carr *v.* Railway Co., 7 Exch. 707.
[2] Garton *v.* Bristol & Exeter Ry. Co., 1 B. & S. 112.
[3] Brantley *v.* South Eastern Ry. Co., 12 C. B. (N. S.) 74. See also Baxendale *v.* Eastern Counties Ry. Co., 4 C. B. (N. S.) 78.

that another shipper had been served at a lower rate.[4] Nevertheless, even at common law inequality between two rates was often made use of as evidence that the higher rate was, in fact, unreasonable; and if the lower rate was held to be the reasonable one, the shipper discriminated against was allowed to recover the difference between the two, on the ground that it was an overcharge, never as damages for the discrimination.[5]

But with the development of the railroad came a realization of their tremendous power of fostering or hindering the prosperity of those whom they served, and the English Parliament, about the middle of the nineteenth century, passed several statutes, the purpose of which was to enforce equality, as well as reasonableness, of rates.

In the United States, even prior to any widespread legislative action, the courts realized the utter dependence of the public on the carriers, and on the railroads in particular, under modern economic conditions. Hence it is not surprising to find frequently repeated condemnations of all discriminations as unjust and illegal. In a large number of cases the courts have either refused to enforce a contract by which a carrier agreed to favor one shipper, or have refused to allow damages for the breach of such a contract.[6] But while rate discrimination has been condemned as unjust and illegal, it is believed that only one case on record, besides the principal case, has allowed the less favored shipper to recover a like rebate on his own shipments, as the measure of damages suffered by reason of the discrimination, though often on the ground of excessive charge.[7] This difference between the higher and lower rate has never been accepted as the common law measure of damages for discrimination. As said by the United States Supreme Court: "Even in those American courts which hold that the rates must not only be reasonable but equal, the doctrine has never been so far developed as to settle the measure of damages." [8]

While this question of the measure of damages has remained in so much doubt at common law, one would suppose that it would have been settled by statutes whose very purpose is to prevent discrimination. In England the statutes were passed at a comparatively early day, when the public had only begun to realize the evils of discrimination. In its construction of the acts of Parliament referred to above the House of Lords made a careful distinction between overcharge and damages. The court held that the statute

[4] Denaby *v.* Manchester Ry. Co., L. R. 11 App. Cas. 97 (with review of cases); Great Western Ry. Co. *v.* Sutton, L. R. 4 H. L. 226.

[5] Cook *v.* Chi. R. I. & P. Ry. Co., 81 Iowa 551, 36 N. W. 1080, 25 Am. St. Rep. 512, 9 L. R. A. 764.

[6] Messenger *v.* Penna. R. Co., 8 Vroom. (N. J.) 531, 18 Am. Rep. 754; Fitzgerald *v.* Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

[7] Hays *v.* Penna. Co., 12 Fed. 309. This seems to be the only case based on the common law in which this doctrine is followed. No other cases are cited by the court.

[8] Penna. R. Co. *v.* Inter. Coal Co., 230 U. S. 184, 201.

did not require the carrier to publish any fixed rate, but made the lowest rate the reasonable one, as many cases had done at common law.[9] Likewise where one shipper was paid more than the lowest rate he was allowed to recover the difference as an overcharge, but not as damages for discrimination.[10] This distinction is fundamental and failure to notice it has been the cause of much confusion in the interpretation of the statutes in this country.

The American statutes were framed and passed after a longer and more bitter experience with rate discrimination and the evils flowing therefrom. These statutes, notably the Interstate Commerce Act, usually call for vigilant administrative action and there is much closer supervision over the relations between shipper and carrier. A commission is usually created, one of whose chief functions is to pass on the reasonableness of rates, and when a rate has been approved by this body it becomes the legal rate. As a rule variations from this rate, on the one side or the other, are strictly forbidden, and there are especially rigid prohibitions upon, and attached to, rate discrimination. For such violations there are usually imposed penalties of a criminal nature, to be enforced by the commission, and, in addition, the carrier is made liable in damages to any person injured by reason of the violation.

Though the meaning of the statutes apparently is clear and distinct enough, the question of the proper measure of this damage, under substantially similar clauses, has recently given rise to direct conflict between two highly respected courts. In the recent case of *Sullivan* v. *Minn. & R. R. Ry. Co.* (Minn.), 149 N. W. 134,[11] the Supreme Court of Minnesota held that where a statute gives a shipper a right to recover damages suffered from the violation of the law forbidding discrimination, if one shipper has received rebates, the proper measure of damages suffered by another shipper who has paid the lawful rate, is, in the absence of other evidence of damage, the recovery of a like rebate on his own shipments. This result seems to be reached by reliance upon these two

[9] Deanby *v.* Manchester Ry. Co., L. R. 11 App. Cas. 97, 116; Great Western Ry. Co., *supra.*

[10] *Ibid.*

[11] This was a rehearing of the case. The original opinion, which contains most of the argument of the court, is found in 121 Minn. 488, 142 N. W. 3, 45 L. R. A. (N. S.) 612. On the first hearing both counsel and court overlooked the provision in the statute (Minn. R. L. 1905, § 1986) which gives a civil remedy for discrimination, and the decision seems to be based in part upon this supposed lack of remedy—the court arguing that because no remedy was provided the intent was to preserve what the court took to be the common law remedy. The words of the damage clause were as follows: "Any common carrier or warehouseman who shall do or cause to be done any act in this chapter forbidden, or fail to do any act therein enjoined, or who shall aid or abet in any such act, shall be liable in damages to any person injured thereby." In the case of Hoover *v.* Penna. R. Co., 156 Pa. St. 220, 27 Atl. 280, involving the Pennsylvania statute, the court held that no damages could be recovered without proof of actual damage. In Cohn *v.* St. L., I. M. & S. Ry. Co., 181 Mo. 30, 79 S. W. 961, the Missouri statute was held to have the same meaning.

propositions which the court lays down in regard to the shipper's common law remedy for discrimination: First, that discrimination gave a shipper a right of action against the carrier; and, second, that the measure of damages in such action was the difference between the rate charged him and that charged the favored shipper. The first of these propositions would seem to be extremely doubtful, and the second almost entirely unsupported by authority, for although the shipper was often allowed to recover this difference, it appears, as pointed out above, that this sum was recovered, not as damages for discrimination, but as an excess charge over and above the lawful and reasonable rate, this often being the case both at common law and under the English statutes.[12]

But from the fact that this difference was often recovered at common law on the ground of overcharge, it by no means follows that it should be made the measure of damages under a statute allowing recovery of "damages suffered by reason of the violation of this statute," where the particular violation happens to be the giving of a rebate. It would in no way seem to be a proper measure of damages. Under the statutes a rate is decided upon or approved, by the commission as the reasonable rate, and it remains the lawful rate until changed by the commission. A shipper who pays no more than this rate has no right to object to his own charge, and if another shipper is given a rebate, which is a violation of the statute, a shipper paying the lawful rate is given the right to collect such damages as he suffers by reason thereof; but in fact such damages might easily be much greater, or, on the other hand, far less than the amount of the rebates. The sole case in which this amount would even approach an accurate measure of damages would be where the goods shipped were sold in direct competition and under precisely the same conditions in other respects.

There would seem to be no reason why the damages here should not be estimated by the same method that is employed in a case where the carrier violates the statute by discriminating between shippers in respect, not to rates, but to service, which likewise gives a right of action to persons injured. In such case it is clear that the statute means to require the shipper to prove his damage, since there is no conclusive presumption of injury. Nor would there seem to be any more reason for a conclusive presumption of injury because of violation of the statute in the form of rate discrimination, the right of action in both cases being based upon identically the same words. The conclusion that the statute means for the damages to be proved in both cases seems unavoidable.

The Supreme Court of the United States recently refused to allow the amount of the rebates as a measure of damages under the Interstate Commerce Act and held that damages had to be proved in order to be recovered. In a strong opinion the court gave another very sound reason for its view: "To adopt such a rule and

---

[12] Cook *v.* Chi., R. L. & P. Ry. Co., *supra;* Denaby *v.* Manchester Ry. Co., *supra;* Great Western Ry. Co. *v.* Sutton, *supra.*

arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of the rates, and, contrary to the statute, would make the carrier liable beyond those inflicted and to persons not injured." [13]

In the Supreme Court view, there is no display of partiality for the carrier, or lack of interest in the public welfare. The broad powers usually given the commission and the heavy criminal punishment provided for violations, tend to insure against overcharges, rebates, and other evils of that character. But, in addition to these safeguards, a right of action has generally been given those injured. This allowance of damages is meant either as an extra penalty, or purely to reimburse the loser. If intended as the former, it should be strictly construed, and a strict construction of the word "damages" would seem to limit it to actual damages proved in court. If intended only to reimburse the losing shipper, all that he can claim is the damages that he has suffered and can prove.

DAMAGES FOR MENTAL ANGUISH RESULTING FROM THE WRONGFUL MUTILATION OF A DEAD BODY.—The right of the next of kin to possession of the corpse for burial purposes is strictly speaking a growth of the American common law. The English common law recognized no property rights in a dead human body.[1] Always a subject intimately connected with the religious rites of a people, it is not surprising that shortly after the Norman Conquest the English ecclesiastical courts should have taken jurisdiction over the final disposition of the bodies of the dead.[2] The common law courts refused to interfere with the power thus taken by the spiritual courts but confined their jurisdiction to protecting the monuments erected in memory of the dead. As was said by Lord Coke,[3] "The burial of cadaver that is *caro data vermibus* is *nullius in bonis* and belongs to ecclesiastical cognizance; but as to the monument action is given, as hath been said, at common law for the defacing thereof." Because of this division of cognizance between two systems of jurisprudence the whole law surrounding the burial of the dead became confused and with the complete separation of Church and State it became necessary for the American courts to

---

[13] Penna. R. Co. *v.* Inter. Coal Co., 230 U. S. 184, 206.

[1] Williams *v.* Williams, L. R. 20 Ch. Div. 659. In Matter of Widening Street, 4 Bradf. 403, it was said by Hon. Samuel Ruggles: "It will be seen that much of the apparent difficulty of this subject arises from a false and needless assumption in holding that nothing is property that has not a pecuniary value. The real question is not the disposable marketable value of a corpse, or its remains, as an article of traffic; but it is of the sacred and inherent right to its custody in order to bury it and secure its undisturbed repose."

[2] 3 Co. Inst. 203; see in Matter of Widening Street, *supra.*

[3] 3 Co. Inst. 203.